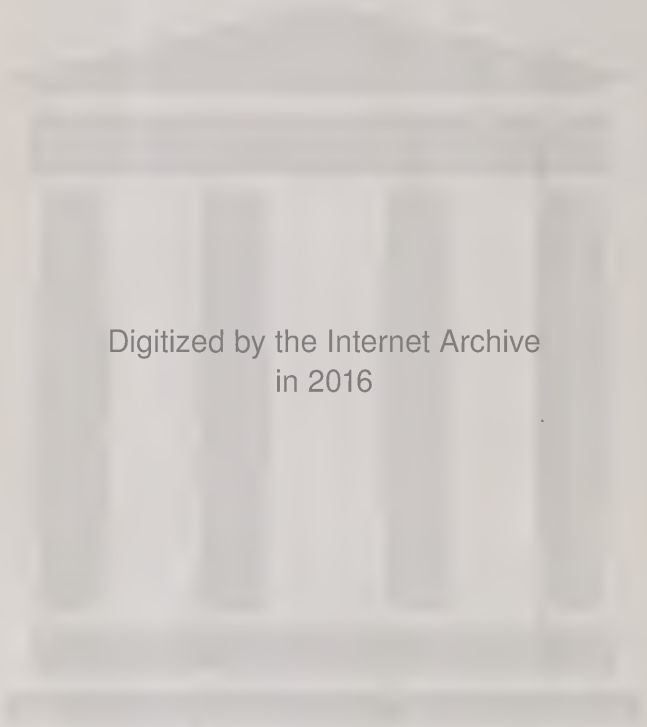

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

1951

Volume I
Part XII

The Government Printer, Pretoria
1951

G.P.-S.4919—1951-2—500.
(Req. 12/384–21/7/51).

CASE No. 12 OF 1951.

MSHIZA NTOMBELA (Appellant) *v.* MAGIYA ZUNGU (Respondent).

N.A.C. CASE No. 111/50.

VRYHEID: Wednesday, 28th March, 1951. Before Steenkamp, President, Israel, Permanent Member and Rossler, Member of the Court (North-Eastern Division).

Practice and Procedure—Late noting of appeal.

Held: That a late appeal from a Chief's Court, is not properly before the Native Commissioner's Court unless condonation for late noting of a appeal is granted.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President), delivering the judgment of the Court.

The Chief tried the case on the 27th March, 1950, and entered judgment for defendant on the same day. On the 6th July, 1950, plaintiff noted an appeal to the Native Commissioner who, after hearing evidence, allowed the appeal and entered judgment for plaintiff for one beast with costs.

The plaintiff did not note his appeal from the Chief's Court within the prescribed period of 30 days, nor was application made to the Native Commissioner for an extension of time, in which to note the appeal.

In Zulu *v.* Zulu, 1935, N.A.C. (T. & N.) 19, this Court held that unless condonation is granted, the appeal from the Chief's Court is not properly before the Native Commissioner's Court.

Counsel for appellant has quoted that case and the only point he has taken in the present appeal is that it was not competent for the Native Commissioner to hear the appeal. We agree with Counsel's contention and it is ordered that as the proceedings before the Native Commissioner were *void ab origine,* they are set aside with costs. The Chief's judgment is restored.

For Appellant: Mr. Conradie of Messrs. Conradie & Wright, Vryheid.

For Respondent: In person.

Cases referred to:—

Zulu *v.* Zulu, 1935, N.A.C. (T. & N.) 19.

CASE No. 13 OF 1951.

FALIKAYISE ZULU (Appellant) *v.* PHAPHAYI MHLONGO (Respondent).

N.A.C. CASE No. 8/51.

VRYHEID: Wednesday, 28th March, 1951. Before Steenkamp, President, Israel and Rossler, Members of the Court (North-Eastern Division).

Native Law—Ngqutu—Uhlanga beast identical—Manner of selection and indication of Ngqutu beast.

Held: That (1) the Uhlanga is identical with the Ngqutu beast and is given to the bride's mother by the bridegroom; and (2) That the Ngqutu or Uhlanga beast is pointed out on the day of delivery by the bridegroom, or failing this by the bride's father *publicly at a family gathering.*

Israel, Permanent Member (delivering the judgment of the Court):—

Respondent in this interpleader case, now appellant and hereinafter referred to as Judgment Creditor, obtained a judgment against one Jeremiah Mhlongo, and in satisfaction thereof, issued

a writ of execution, as a result of which the Messenger seized four head of cattle at the kraal of one Absolom Mbongi Magagula. Claimant, now respondent in this Court, who is Judgment Debtor's step-mother, was an inmate of Magagula's kraal at the time of the attachment and claimed the cattle seized, four head, as hers, although the Judgment Debtor was present when execution was levied and claimed the cattle as his. She therefore instituted interpleader proceedings in the Native Commissioner's Court and was successful in having the cattle declared "not executable", and it is against the judgment that the Judgment Creditor is now appealing.

At the outset the Acting Native Commissioner who presided in the interpleader case placed the onus on the Judgment Creditor because he said: "the cattle were attached in the possession of claimant." Had this been so, the onus would rightly have rested on the Judgment Creditor, but from her own admission, claimant was no more than an inmate of the kraal where the cattle were found and was not even the kraal-head's ward, her rightful guardian being the Judgment Debtor. In these circumstances it cannot be said that the cattle were seized while in her possession and the onus should not have been removed from her shoulders.

Claimant bases her claim on the fact that the four head of cattle in question were the progeny of one of the animals paid as lobolo for her daughter, Nicolina, whom Magagula married, and that this animal was the ngqutu beast and therefore—with its increase—her own property. In her evidence-in-chief, she averred that this ngqutu beast had been given to her by her daughter's husband, but in answer to the Native Commissioner who recalled her at the end of the case, she said: "My late husband pointed out the dun beast (original animal) as my uhlanga beast, as payment for having borne this daughter. It was not pointed out to me by Magagula." It was this variance of description of the animal in question which led this Court to invoke the assistance of assessors. The questions put to them and their answers are appended to this judgment, but the gist of their replies, so far as the immediate issues involved are concerned, is (1) that the uhlanga is identical with the ngqutu beast, and is given to the bride's mother by the bridegroom; and (2) that the ngqutu or uhlanga beast is pointed out on the day of delivery by the bridegroom, or failing this, by the bride's father *publicly at a family gathering.*

These expressions of opinion this Court is prepared to accept as reflecting true Native Law, and the claimant is thus faced with the task of proving that the ancestor of the cattle in dispute was in fact an ngqutu or uhlanga beast, properly indicated in accordance with the procedure outlined above.

Can it be said that she has discharged this onus? In the first place she is far from consistent regarding the person who pointed out the beast as ngqutu or uhlanga, and her evidence, as well as that of her witnesses, is merely to the effect that her husband, during his lifetime, mentioned, apparently only casually, that he had given the original animal to her as her ngqutu. The lobolo-payer himself who gave evidence for claimant admitted that when delivering the lobolo cattle, he did not point out any one of them as the ngqutu beast, and nowhere on record is there any mention of any family gathering for the purpose of pointing out or allocating the ngqutu beast, with the result that in all the circumstances the irresistible conclusion is that there was in fact no such pointing out of the ngqutu at any time, either by the dowry-payer or the bride's father.

As the capacity of women to own property in certain circumstances is a radical departure from the basic Native Law, any circumstance which, in the case of the ngqutu beast, has in it the element of such a departure from fundamental principles, must be meticulously canvassed, and the onus of proving it is heavy.

This Court holds that the claimant has failed to discharge this onus, and the appeal must succeed.

The appeal is allowed with costs, and the Native Commissioner's judgment altered to read:—

"The cattle are declared executable with costs."

Questions put to Assessors by Court, and replies thereto.

Assessors:

1. Mbuzeli Ngema, from Nongoma.
2. Mhlahlo Ngcobo, from Nongoma.
3. Chief Manyala Biyela, from Nkandhla.
4. Mpisendhlini Biyela, from Melmoth.
5. Chief Siboniseleni Mdhlalose, from Nqutu.
6. Chief Phineas Sithole, from Nqutu.

Q: What is an Uhlanga beast?

A: *Mbuzeli Ngema:* It is the same beast as the ngqutu beast. That beast belongs to the mother of the daughter.

Mhlahlo Ngcobo: It is the cow which is given to the mother of the child. It is given or paid by the son-in-law who marries the child. It is paid over to the mother.

All Assessors: Yes, the beast belongs to the mother.

Ch. Manyala Biyela: If my daughter marries and lobolo is paid for her and my son-in-law has not paid the beast, I tell my wife:—"Take that beast—it now belongs to you." If my wife has only two sons, he takes that beast and gives it to the younger son.

Mpisendhlini Biyela: I say the same. If the son-in-law did not pay that beast, then the father of the daughter takes that beast and hands it over to the mother.

Ch. S. Mdhlalose: Correct. If six head of cattle are paid, the sixth one is called the ngqutu beast and that belongs to the mother. If 11 head are paid (that number has only been brought about by the Government—in the olden days it was only six), it is then the eleventh beast.

Ch. P. Sithole: Yes, that is the position.

Q: What is the difference between an uhlanga beast and an ngqutu beast?

A: by all Assessors: There is no difference.

Q: Is not the ngqutu beast paid to the mother of the daughter for having looked after the daughter and having kept her intact?

A: *by all Assessors:* Yes, that is the position.

Q: Is the uhlanga beast not paid to the mother of the child by her husband for having given birth to a daughter?

A: *by all Assessors:* That beast is the ngqutu beast, but it is not paid at the birth of the child. It is paid when that daughter gets married.

Q: That ngqutu beast—is it not a present from the son-in-law to the mother-in-law?

A: *Mhlahlo Ngcobo:* No. Once the lobolo has been paid and the cattle are there, the father of the daughter who is getting married speaks first and announces that the son-in-law should point out the ngqutu beast.

Q: Therefore it means that the son-in-law is giving a beast to his mother-in-law?

A: Yes—after the father of the daughter who is getting married has made that announcement.

Q: Then he asks the son-in-law to point out a particular beast as the ngqutu beast?

A: Yes, we are all agreed to that. Then the son-in-law points out the ngqutu beast.

Q: Why do some call it the ngqutu beast and others the uhlanga beast?

A: *Mhlahlo Ngcobo:* That does not matter. In the olden Zulu Custom there was never a name of ngqutu. We used to call it uhlanga. This name ngqutu was brought about by the Government who said people should pay ten head of cattle and the eleventh one would be the ngqutu beast. In the olden days we never knew of the word ngqutu.

Mbuzeli Ngema: In the olden days—my father, who was a Chief, used to call it the uhlanga beast. If a son-in-law failed to pay the beast, it was the father of the daughter who was getting married who used to point out a beast and say to the mother:—"There is your beast." This name of ngqutu was brought about by the officials.

Ch. S. Mdhlalose: I differ. Ngqutu is an old Zulu name. It was not given by the Government. Uhlanga and ngqutu are one and the same word. They were both used.

Q: The ngqutu or uhlanga beast was always a slaughter beast?

A: *Ch. S. Mdhlalose:* No! That beast belongs to the mother of the child.

Q: Was that beast not always killed and eaten?

A: *by all Assessors:* No!

Q: What was the name of the beast which was given to the mother for slaughter purposes?

A: There is no other beast which is given to the mother of the daughter, except that beast.

Q: We know that when a girl has been seduced, the mother collects all her friends and they go to the seducer's kraal and take a beast and slaughter it.

A: *Mhlahlo Ngcobo:* That is a different beast altogether. That beast is claimed by the father of the girl who has been seduced and that is the beast which is slaughtered.

Ch. S. Mdhlalose: I do not agree with the others. The mother of the daughter who has been seduced calls her friends and they collect a beast from the seducer and that beast is slaughtered, and that is the ngqutu beast.

Q: If a daughter is not seduced and she gets married, what happens to the beast the mother then gets?

A: *Ch. S. Mdhlalose:* That beast is not slaughtered. It is handed over to the mother of the child and it becomes her property and she can do with it what she likes—she can sell it.

Q: How do you reconcile that with your custom—i.e. that no woman can own property?

A: *Ch. S. Mdhlalose:* Although our law and custom does not agree that women should own property, the right of owning the ngqutu beast has always been undisputed.

Q: If the mother of the daughter dies, what happens to the ngqutu beast?

A: Then that belongs to the guardian or heir of that woman who died—i.e. the heir to her house.

Q: If she sells that beast, what happens to the money?

A: *Ch. S. Mdhlalose:* She keeps that money and she can buy' anything she likes with it, and whatever she buys is her property. Even if she speculates with it—it is *her* business. It does not belong to her husband, although the husband remains the guardian over her, but that property belongs to her.

Ch. Manyala Biyela: If the husband is in difficulties he has the right to approach his wife and ask her to give him that beast, but if she refuses, he cannot do anything.

Q: If she sells the ngqutu beast and speculates with it and eventually has about £5,000, can the husband not use that money for kraal or house purposes at all?

A: *Mhlahlo Ngcobo:* What he can do is this—he can ask, but if she refuses, he cannot do anything.

Q: If a woman, after she is married, goes to work and earns money, whose money is that?

A: *Mhlahlo Ngcobo:* What she earns belongs to her husband because she is a lobolaed woman.

Q: Why should that belong to the husband, and yet any money she earns by speculation—not?

A: *Ch. Monyala Biyela:* That is the law.

Q: Your original Native Law was to the effect that no woman can own any property.

A: *Mhlahlo Ngcobo:* In view of the fact that she is a lobolaed woman—once she comes to her husband with everything she owns—even if she dies—she remains of that kraal and does not go back to her original place of birth. A woman can own cattle, but the majority belongs to the man.

Q: You say her earnings do not belong to her and yet the ngqutu beast belongs to her?

A: *Mhlahlo Ngcobo:* Yes, that is the position. That is the law and it is considered this way, that she brought forth that child and looked after it and that is the reason why that ngqutu beast belongs to her. That has always been our custom, even before the European people came to this country.

Ch. S. Mdhlalose: The ngqutu beast belongs to the mother of the daughter, but although that beast belongs to her, her husband remains the guardian. If she wants to sell that beast, she approaches her husband and asks for his permission first. (All Assessors agreed on that point). It is a mere formality.

Q: If the husband says "No" to the selling of the ngqutu beast—what then?

A: *Mhlahlo Ngcobo:* That is not the law. If the husband disagrees with her and does not want her to sell the beast, it amounts to the husband disappointing her.

Q: Can she not sell it then?

A: *Mhlahlo Ngcobo:* If the husband refuses—in some cases she does not sell the beast, but some women would sell it by force.

Q: The correct thing is that they cannot sell it without their husband's permission?

A: Yes. He will finally have to agree to sell that beast.

Q: I take it therefore that you cannot give me a definite reply regarding this—if a man is determined that his wife should not sell the ngqutu beast, he can withhold his consent?

A: *Mbuzeli Ngema:* In a case where a man has sons in the house, and the woman wants to sell the ngqutu beast, and the husband refuses, what usually happens is this—the sons are called together and the matter discussed, and finally he has to agree to the sale. He must agree to the sale of the beast if the wife wants to sell it because that was paid by the son-in-law as the uhlanga beast and it belongs to her.

Q: Do you all agree that a woman cannot sell the beast without her husband's permission?

A: *by all Assessors:* Yes.

Ch. Manyala Biyela: In some cases you find it is a fine beast, and if I like it, I ask my wife to sell it to me and I then take it over from my wife. That is the reason why you find a lot of cases coming up. This takes place in the absence of our sons, and say for instance, I die, my sons, after my death, claim the ngqutu beast as belonging to their mother.

Q: When the lobolo is paid in a lump, i.e. eleven head of cattle, how do they know which is the ngqutu beast or the uhlanga beast?

A: *Ch. Manyala Biyela:* The son-in-law points out the ngqutu beast.

Q: And if he does not do that at the time of the payment?

A: Then the father of the girl points it out.

Q: At any time after the marriage, or at the time of the celebration?

A: *Mhlahlo Ngcobo:* If the lobolo cattle all come in and there is no time for me to point out the ngqutu beast, I can pay it at a later date. I mean—pay it to my wife.

Ch. S. Mdhlalose: In the olden days, as far as I know, the question was very simple. When the lobolo was paid, the father of the girl used to point out the beast, but now, ever since Europeans came to this country, it is the son-in-law who points out the beast to the mother of the girl. It is pointed out the same day when the lobolo is paid.

Q: Can it be pointed out one or two years afterwards?

A: No. It is pointed out the same day as the lobolo comes in.

Mhlahlo Ngcobo: I have already said that. If the father of the girl wants that beast for another purpose, he pays it in at a later date.

Q: He first points it out to his wife and later replaces it?

A: Yes, that is so.

Q: When that ngqutu beast is pointed out to the mother of the girl, it is pointed out publicly, in front of all the people?

A: *Mhlahlo Ngcobo:* Yes. A family gathering is called. A brother of the husband who is getting married comes forward. The son-in-law points out the ngqutu beast. Sometimes it is the son-in-law who points out the beast and sometimes the father of the girl. The father does it because the son-in-law failed to do so at the time. When the father points out the beast he does so publicly, although the pointing does not take place on the day of the ceremony but when the lobolo is paid and when his brothers are present. He does so in their presence. It is a family gathering.

Ch. S. Mdhlalose: It is a wellknown thing all over Zululand that the ngqutu beast is pointed out by the son-in-law when the lobolo is paid.

Question by Appellant: Is it not true that you people—when you want lobolo for your daughters—you only want eleven head of cattle and you don't mention anything about the beast that should go to the mother of the girl who is getting married?

A: *Ch. S. Mdhlalose:* Yes, that is true.

Mbuzeli Ngema: In the olden days we used to ask about six or eight head, but that uhlanga beast used to be paid then. To-day we just ask for eleven head of cattle.

Question by Court: In that case—i.e. the eleven head—how do you know which is the ngqutu beast?

A: *Ch. S. Mdhlalose:* The son-in-law must point out the ngqutu beast. (Agreed to by all Assessors).

Question by Respondent: I just want to know—is it not true that it is the son-in-law who pays the uhlanga beast?

Court: But they have said so.

Respondent: No further questions. The Assessors have told Your Honours the truth.

President thanks Assessors for their attendance and for having replied to all the questions.

Appellant: In person.

Respondent: In person.

CASE No. 14 OF 1951.

MUZIWOMATHE GAZU (Appellant) *v.* **DLABA ZULU (Respondent).**

N.A.C. CASE No. 11/51.

VRYHEID: Wednesday, 28th March, 1951. Before Steenkamp, President, Israel, Permanent Member, and Rossler, Member of the Court (North-Eastern Division).

Native Law and Custom—Recovery of lobolo paid.

Held: That it is not competent for the father of the husband to bring an action for the recovery of the lobolo paid and only the husband may do so.

Appeal from the Court of the Native Commissioner, Nongoma.

Steenkamp (President), delivering the judgment of the Court.

Plaintiff, on behalf of his son, paid to defendant 18 head of cattle and £10 making a total of 20 head of cattle as lobolo for defendant's daughter whom plaintiff's son had previously seduced and rendered pregnant.

A few days after the wedding the daughter gave birth to a child. Both she and the child died and plaintiff (now respondent) claimed from defendant (now appellant) in the Chief's Court, the refund of the lobolo paid. The Chief gave judgment for six head of cattle and in his reasons for judgment he states that he divided the 18 head of cattle into two and as defendant had gifted three head of cattle as "mbeko" to plaintiff's son, he deducted these from the nine, leaving six head of cattle to be refunded.

Plaintiff was not satisfied with this award and appealed to the Native Commissioner who upheld the appeal and altered the Chief's judgment to read:—"For plaintiff for 11 head of cattle and £10 and costs."

Defendant has now appealed to this Court on general grounds. He was not represented in the Court below and noted the appeal personally, but he was legally represented at the hearing of the appeal before this Court.

Counsel for appellant has raised the question that it is not competent for the father of the husband to bring an action for the recovery of the lobolo paid and only the husband may do so. He has quoted the case of Mtimunye *v.* Mabeno, 1939, N.A.C. (T. & N.) 129 and Majola *v.* Ndhlovu, 1942, N.A.C. (T. & N.) 43, in which this Court ordered, in both cases, that the summons be dismissed with costs as plaintiff had no *locus standi.*

Counsel for respondent has quoted the case of Dwayi *v.* Bhekumbuso, 1926, N.H.K. 23, in which it was held that the father must sue if no marriage takes place. The later cases of 1939 and 1942 may be distinguished from the decision of the 1926 Native High Court decision because in the latter case no marriage had taken place and the cattle were still looked upon as "sisa" from the prospective bridegroom's father to the girl's father.

There can therefore be no doubt that the plaintiff had no *locus standi* to sue for the recovery of the lobolo. We are, however, faced with this difficulty that the Chief awarded plaintiff six head of cattle and as he was not satisfied with this number, he noted an appeal to the Native Commissioner. The defendant was apparently satisfied as he had not noted a cross-appeal and Counsel for plaintiff has argued that the judgment for six head of cattle cannot be interfered with. He has quoted the case of Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 65, as authority in support of his argument, but in that case the appellant had admitted before the Native Commissioner that he owed the number of cattle and was prepared to pay them. In the present appeal, the defendant (now appellant) denied before the Native Commissioner that he owed any cattle and in our opinion it would be iniquitous to bind the defendant to a judgment which the Chief was not competent to give, owing to plaintiff being unsuited.

We have wide powers under section 15 of the Native Administration Act, and as the defendant knew when plaintiff appealed against the award, that the case would be heard *de novo* before the Native Commissioner, it seems to us that it was not necessary to file a cross appeal. When he was called upon to plead, he denied plaintiff's claim in toto.

Defendant is in this position that if the Chief's judgment is confirmed, he can still be sued by his son-in-law for refund of lobolo, as the contract was between the son-in-law and himself.

In these circumstances justice demands that relief should be granted in the light of the arguments submitted by Counsel for appellant, and it is ordered that the appeal be and is hereby

allowed, and the proceedings in the Chief's Court and in the Court of the Native Commissioner are set aside. Plaintiff to pay costs in this Court and in the Courts of the Chief and the Native Commissioner.

For Appellant: Mr. Turton of Messrs. Guy, Turton & Hannah, Vryheid.

For Respondent: Mr. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

Statutes, Proclamations, etc., referred to:—

Section *fifteen* of the Native Administration Act, 1927 (Act No. 38 of 1927).

Cases referred to:—

Mtimunye *v.* Mabeno, 1939, N.A.C. (T. & N.) 129.
Majola *v.* Ndhlovu, 1942, N.A.C. (T. & N.) 43.
Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 65.
Dwayi *v.* Bhekumbuso, 1926, N.H.C. 23.

CASE No. 15 OF 1951.

LUKHASA SHOYISA (Appellant) *v.* **NGQOZI SHOYISA (Respondent).**

N.A.C. CASE No. 19/51.

VRYHEID: Thursday, 29th March, 1951. Before Steenkamp, President, Israel and Rossler, Members of the Court (North-Eastern Division).

Native Law and Custom—"Ethula" Custom.

Held: That where "Ethula" operates in favour of a superior house against an inferior house, the heir of the superior house is entitled to lobolo of the girl affected by the "ethula", and it is his duty and his alone, to pay the balance of lobolo owing in respect of the mother of the "ethulaed" girl.

Appeal from the Court of the Native Commissioner, Nongoma.

Israel (Permanent Member): Delivering the judgment of the Court.

In the Chief's Court Plaintiff's claim was for—"ten head of cattle and ngqutu beast, the lobolo of Semende Shoyisa, full sister of the defendant, on the grounds of "ethula", plaintiff being the general heir of Mvunyelwa, father of the parties, and the said girl having been married off by defendant, who received her lobolo." To this defendant pleaded that he denied the "ethula" arrangement but admitted that he had received the lobolo for Semende and asserted that he had disposed of it to the family of his and Semende's mother in payment of her, the mother's, lobolo, the parties' father, Mvunyelwa, having failed to make such payment during his lifetime.

The Chief found that plaintiff was entitled to the girl's lobolo and gave judgment in his favour as prayed. The defendant thereupon appealed to the Native Commissioner, who upheld the Chief's judgment. He has now come to this Court and his grounds of appeal are as follows:—

1. Defendant denies the allocation of huts and status alleged to have been made by late Mvunyelwa Shoyisa, father of the parties, while he resided in the Ngotshe district and immediately before his death.

2. The girl Semende was a full sister of the defendant. Defendant's mother married Mvunyelwa before plaintiff's mother, and the defendant does not see how it can be said that cattle used to lobolo his mother came from plaintiff's house which did not exist at the time. It has not been proved that the said cattle were the lobolo of any of plaintiff's sisters.

The facts which are not disputed are that Mvunyelwa, the father of the parties, had ten wives, defendant being the son of the fifth and plaintiff the son of the sixth, in order of marriage; that the first wife had no son; that Semende was a daughter of defendant's house, i.e. the fifth; and that Mvunyelwa died in 1925.

The claim which defendant disputes is in effect that there was an "ethula" and that plaintiff (whose position, however, as general heir to Mvumyelwa by reason of the alleged affiliation of his mother to the Indhlunkulu was accepted by defendant) was entitled to the lobolo of Semende.

In his evidence plaintiff stated that his mother had been affiliated to the Indhlunkulu and that for that reason he was the general heir to the late Mvunyelwa. According to him and his witnesses, a declaration to the effect that Semende's lobolo was allocated to him, was made by the parties' late father during his last illness and although defendant denied knowledge of such allocation, his own witness, his mother, confirmed that at the same meeting plaintiff was nominated as general heir and—a significant fact—both defendant and every other witness for and against him, freely acknowledge that plaintiff is the general heir. Even Mbango, the second wife's son, who, if there had been no division of the kraal, would have had a prior claim to the heirship, was content to wear the mantle of the "father of the kraal", with which he says he had been invested, and to accept the plaintiff as general heir. There was stated to have been at the declaration some talk, also, regarding the division of the kraal, but the circumstances all point to the probability that such division of the kraal and the disposition of the houses had already been effected and that the declaration was merely a confirmation of the *de facto* position. Plaintiff's status, therefore, as Indhlunkulu and general heir, through affiliation of his mother to that house, is unassailable.

There is the question of "ethula" to be considered. While defendant, supported by his mother, denied that more than six goats, representing one head of cattle, were paid by the late Mvunyelwa as part lobolo for her, plaintiff asserted that eight head had been paid on this account by Mvunyelwa and that this eight head had come from his mother's house, i.e. the Indhlunkulu. He further asserts that the lobolo of the girl Semende, being the eldest girl of the house so established, was declared to be allocated to him and that he was to be responsible for paying the balance of the lobolo owing on defendant's mother. Whether one or eight head were paid by Mvunyelwa, the fact that some cattle were actually paid in respect of defendant's mother's lobolo and were provided by the Indhlunkulu, is not disputed, and the custom of "ethula" therefore operated.

The anachronism to which defendant refers in his second ground of appeal is more apparent than real, for there is nothing impossible in establishing a sixth house and affiliating it to the Indhlunkulu after the fifth had been created by cattle from the Indhlunkulu. As for the other contentions in the second ground of appeal, nowhere in the record has it been said that the lobolo for the fifth wife came directly from the sixth house established. Plaintiff's claim is based purely on his position as general heir through the affiliation of his mother to the Indhlunkulu. Defendant therefore acted incorrectly in appropriating to himself the lobolo of his sister and in paying it away as lobolo for his mother, as this was an obligation devolving on plaintiff.

Appellant, who appeared in person, has intimated to this Court that one of his witnesses was not available on the day of the trial. It was not a ground of appeal and it appears this contention is an afterthought. He admitted that the witness could only confirm the evidence of his mother who testified on his behalf. We are satisfied, after questioning the appellant, that the calling of this additional witness would not have assisted him in his case.

In all the circumstances, therefore, plaintiff's claim to Semende's lobolo is well founded, and the appeal is accordingly dismissed with costs.

Appellant in person.
Respondent in person.

CASE No. 16 OF 1951.

GUBA NGCOBO (Appellant) *v.* MISHACK MLABA (Respondent).

N.A.C. CASE No. 1/51.

PIETERMARITZBURG: Monday, 9th April, 1951. Before Steenkamp, President, Israel and Ashton, Members of the Court (North-Eastern Division).

Common Law—Review of judgment—Purchase and sale of immovable property belonging to a third party.

Held: That the review of an existing judgment in a Native Commissioner's Court by same Court is not competent.

Held: Further: That a purchaser of immovable property belonging to a third party is entitled to damages in the event of the seller being unable to deliver the property.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President), delivering the judgment of the Court:—

During 1936 the plaintiff obtained a judgment in the Native Commissioner's Court against the defendant. The judgment reads as follows:—

> "The defendant, Mishack Mlaba is hereby ordered to hand over the Title Deeds of Lot B.Q. to Trevor Cedric Stone or his successors in office as Clerk of the Native Commissioner's Court, Ixopo, who is hereby authorised to sign the necessary documents to effect transfer to Guba Ngcobo of five (5) acres of the above property. Defendant to pay costs."

At that time the five acres of ground had not been surveyed and it naturally follows that no documents for transfer could be completed until such time as a proper diagram had been prepared by a surveyor. The ground was not registered in the name of defendant and it was therefore also necessary to have this effected before the five acres of ground could be transferred to the plaintiff.

Plaintiff obtained the services of a Land Surveyor who duly carried out the survey and prepared a diagram for 5·0275 acres. The land was never transferred into the name of the plaintiff, for various reasons, which will be commented on later.

Plaintiff (now appellant) has now sued the defendant (now respondent) for alternative relief, viz: £50, the present market value of the ground, and £17. 6s., being the amount he paid to the surveyor who carried out the survey of the ground. In his summons plaintiff states that defendant has at all times refused to co-operate with plaintiff in order to give effect to the said order of Court. Defendant's plea is to the effect that he is not indebted to plaintiff in any amount or in any land, and that he had borrowed £10 from plaintiff on the understanding that if he did not repay the loan he would give plaintiff five acres of land. He further pleads that he repaid the £10 to plaintiff's attorney, and for which he holds receipts.

Evidence was led on the question of the loan, and the Native Commissioner came to the conclusion that the £10 had been repaid and entered an absolution judgment—each party to pay his own costs. Plaintiff has now noted an appeal to this Court on the following grounds:—

> 1. The Native Commissioner erred in not granting damages following the judgment pronounced in Case 146/1936, Ixopo, which judgment from evidence adduced, is clearly unable to be satisfied by respondent.

2. Plaintiff relied primarily upon said judgment and the Court was not entitled to enquire into the circumstances which existed prior to the granting of the said judgment 146/1936.

3. It follows that defendant's plea discloses no defence whatsoever, and in any event such plea was not substantiated in that respondent did not legally prove payment, and even if payment, according to the receipts be surmised by the Court such was made ("in mora") with the result that the appellant was, after the 15th October, 1935, legally entitled to transfer of the five acres of Lot B.Q.

4. Evidence discloses that the original agreement Exhibit A was made fraudulently and negligently in that respondent represented himself to be the owner of said land whereas in fact he was not.

5. Evidence shows that the said land should be transferred to appellant whereas it cannot be.

6. The finding of the Native Commissioner was generally against the weight of evidence and not in accordance with law.

7. The onus regarding payment was upon respondent in terms of Agreement Exhibit A, and if in doubt in this respect the Court should have given judgment in favour of appellant which judgment should in any event, follow from latter said judgment 146/1936—*vide* original summons herein which makes no mention of any prior agreement.

Ground 2 is well taken and this Court agrees that the Native Commissioner was not entitled to review the judgment of 1936. That judgment was given by a competent Court and until reversed by a Higher Court, must stand and must be honoured by the parties concerned, and so much the more by other Courts.

Plaintiff in his evidence states that before issuing the present summons he demanded from defendant the handing over of the title deeds to enable him to obtain transfer. Defendant failed to do so and plaintiff further avers that defendant has at no time co-operated and although he had a judgment in his favour for 15 years, he has not obtained the delivery of the subject matter and has therefore been deprived of the use of the land all these years. He is now quite prepared to forego his title to the land if the Court will grant him reasonable damages. which he estimates at £67. 6s.

Defendant in his evidence admits that when he entered into an agreement (a written one, and handed in as Exhibit A), with plaintiff, the land belonged to his father, who was then still alive, and he was therefore unable to give title to that land, and cannot even do so to-day. He admits that he gave five acres as security.

The way we interpret that agreement, it means that defendant sold to plaintiff ground belonging to some other person, which he was entitled to do, but then if he is not able to give delivery he must indemnify the purchaser. This is exactly what plaintiff now asks.

When the case was tried in 1936, the Court must have been satisfied that plaintiff was entitled to the ground, and no Court of Law can ignore that judgment. Now that plaintiff has found that the ground does not belong to defendant, he must surely have a remedy, which is in the nature of the damages he has suffered. He was deprived of the use of the ground for at least 15 years and this calls for damages. The amount of £50 damages is not unreasonable in the circumstances, plus the out of pocket expenses of £17. 6s. 0d.

The appeal succeeds with costs and the Native Commissioner's judgment is altered to read:—

"For plaintiff for £67. 6s. and costs."

For Appellant: Mr. J. Tod of Messrs. Wynne, Cole and Tod of Howick.

Respondent: In default.

CASE No. 17 OF 1951.

SIDANI MKIZE (Appellant) *v.* MANTINDA DHLAMINI (Respondent).

N.A.C. CASE No. 3/51.

PIETERMARITZBURG: Monday, 9th April, 1951. Before Steenkamp, President, Israel and Ashton, Members of the Court (North Eastern Division).

Common Law—Immoral contract respecting child—Maintenance.

Held: That a transaction having the nature of the purchase and sale of a child is immoral.

Held further: That either party to such an agreement is not entitled to maintenance.

Appeal from the Court of the Native Commissioner, Impendhle.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court plaintiff sued the defendant for £78 being in respect of maintenance of a child named Titini for 6½ years. The Chief entered judgment for defendant with costs, but the Native Commissioner allowed the appeal in his Court and altered the judgment to one for plaintiff for £78 and costs in both Courts.

The facts are that about twenty years ago plaintiff's younger brother, Tulolo, seduced a girl by the name of Christine and rendered her pregnant. She gave birth to a male child Titini. Christine was the defendant's ward and therefore he is also the ward of Titini. When Titini was about three years of age, plaintiff bought him from defendant for £4 and looked after the child for 6½ years. Defendant denies that plaintiff bought the child and states that the agreement was to the effect that the child was hired to plaintiff.

While the child was with plaintiff, his younger brother, the natural father of the child, demanded him from plaintiff, who agreed to hand him over and actually did so, but as the child was not happy with his natural father, he ran away to plaintiff's kraal. Plaintiff then asked defendant to care for the child as he was afraid his younger brother, Tulolo would take the child away and that if it was with defendant, Tulolo would not do so.

From the evidence in general, the impression is gained that this illegitimate child was unwanted and he was moved from pillar to post. He was bought by plaintiff and it seems that the parties concerned wanted to revive the system of slavery. We know that Native children, especially boys, have to work at a very early age and there is nothing to indicate that plaintiff did not obtain service from the child in question.

Against the Native Commissioner's judgment an appeal has been noted to this Court. The grounds of appeal are lengthy and as the parties were not legally represented in the Court below, it is hardly necessary to set these grounds out in full. Suffice to state that the appeal is based on the fact that the purchase of a child is illegal and therefore no action can be found. There is, however, the question whether plaintiff may claim to be recompensed for the maintenance of the child for a period of 6½ years.

The appeal was noted late and application is also made for condonation. The reasons for the late noting are not such that this Court would normally grant the application, but as the judgment is manifestly incorrect, the application is granted.

Defendant states that when the child was about 3 or 4 years old, plaintiff came to him and asked for the child to herd his cattle. The child was very young, but when we consider the fact that it was an unwanted child, it is not surprising that defendant held out for payment. Whether it was the purchase price of the child or wages for hire of its services, would appear immaterial and this Court strongly condemns their reprehensible conduct.

When plaintiff took charge of the child, he did so with the object of obtaining services from it, and not from a benevolent point of view. He was a party to an illegal agreement, but even then we have to consider the undue enrichment doctrine. Can it be said that defendant was unduly enriched at the expense of plaintiff? It is true defendant was under an obligation to support the child, but then defendant was entitled to its services, which plaintiff enjoyed for a number of years. Plaintiff was therefore sufficiently compensated for whatever expense he incurred in buying food and clothing for the child.

Plaintiff's claim, as stated before, is based on an illegal agreement, and he is out of Court.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Appeal from Chief's Court is dismissed with costs."

For Appellant: Adv. J. Hershensohnn of Pietermaritzburg.

For Defendant: J. Tod, Esquire, of Messrs. Wynne, Cole & Tod, Durban.

CASE No. 18 OF 1951.

GAMALAKE MLABA (Appellant) *v.* **JOHANNA MVELASE (Respondent).**

N.A.C. CASE No. 5/51.

PIETERMARITZBURG: Tuesday, 10th April, 1951. Before Steenkamp, President, Israel and Ashton, Members of the Court (North-Eastern Division).

Practice and Procedure—Interpleader—Ownership of Ngqutu beast—Judgment of Chief's Court not invalidated by delay in registration.

Held: That a kraal-head is presumed to own all the cattle in his kraal and that any person claiming that such property belongs to some person other than the kraalhead must prove such claim.

Held, further: That where a woman claims attached property as being the Ngqutu beast and/or its progeny, such fact must be conclusively proved.

Held further: That the provisions of Rule 9 of the Chiefs' Court Rules are directory and not peremptory.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff, a Native woman, duly assisted, claimed from the defendant the return of a certain red cow and its black heifer calf which she claims as her property and which were unlawfully attached by the Chief's Induna on behalf of the defendant and which were handed over to the defendant.

The plea is to the effect that the animals in question are defendant's property, having been handed over to him by Mkitshwa Vilikazi for services rendered.

The Native Commissioner ordered defendant (now appellant) to restore the possession of the two animals to plaintiff. Defendant to pay costs. Against this judgment an appeal has been noted to this Court on the following grounds:—

(1) That the Assistant Native Commissioner erred in granting a Spoliation Order when the summons was based on an *Actio Rei Vindicatio.*

(2) It is not within the power of the Assistant Native Commissioner to set aside or disregard a Chief's registered judgment *meru motu* or otherwise.

(3) That the Chief's judgment as registered remains of effect until properly set aside and the attachment thereunder is valid.

(4) That plaintiff had no *lucus standi in judicio.*

(5) That there was no evidence of the seller that an animal was sold to plaintiff which in any case was alleged to be after the judgment of the Chief and could only have been *in fraudem creditorem.*
(6) That there is ample evidence that the animals were defendant's lawful property for the delivery of which he obtained judgment in the Chief's Court.
(7) That on the evidence, apart from legal disability plaintiff was not entitled to any judgment.
(8) That the order for costs in favour of plaintiff is a wrong order.

In the first place the plaintiff, a woman, must prove that the beast in question is her property. She may only own an ngqutu beast or its progeny. She states in evidence that the original beast paid to her as ngqutu was sold and out of the proceeds she purchased a red cow from Mkitshwa. This is the identical beast defendant alleges he received from Mkitshwa for services rendered. The beast had been sisaed to plaintiff's husband and on his death, to her son, Busha, who also died a few years ago. When Mkitshwa did not pay the beast the defendant had him sued and obtained judgment for the beast in question. It was attached about November, 1949, and handed over to defendant by the Chief's Messenger.

Plaintiff can only succeed if she is able to prove that she bought the beast from Mkitshwa and that if such a purchase did take place, it was prior to the date when Mkitshwa disposed of it to the defendant. The plaintiff admits she bought the beast from Mkitshwa long after his case with the defendant. This evidence out of her own mouth, disposes of the matter in favour of the defendant who had already acquired title to the beast before Mkitshwa sold it to the plaintiff.

The legality of the attachment by the Chief's Messenger would hardly appear to be of sufficient importance to give the plaintiff any right to vindicate the property she alleges belongs to her. It seems to us that only the judgment debtor, Mkitshwa, had such a right, as, at the time defendant acquired title to the beast, it still belonged to Mkitshwa and not to the plaintiff. She only acquired an interest and at that a doubtful one, after judgment had been given in favour of defendant for that specific beast.

From the evidence it is very doubtful whether the plaintiff's averment is correct that she used the proceeds of an ngqutu beast to acquire the beast in dispute. The evidence is not convincing and when we bear in mind that a woman cannot own property, most conclusive evidence is required before we will hold that after so many years only the ngqutu beast has survived and all the other lobolo cattle have perished.

The Assistant Native Commissioner has placed the onus on the wrong party. The plaintiff is not a kraal head. All the property at a kraal is presumed to belong to the kraal head, and any other person, including the wife of the kraal head, claiming that the property does in fact belong to some person other than the kraal head, must prove that fact. There is a tendency amongst litigants to get their wives to claim attached property as ngqutu beast and progeny. This subterfuge is used extensively, and this Court must protect judgment creditors unless it is conclusively proved, the onus of which is on the woman, that the attached stock are the ngqutu cattle.

We are not satisfied that the plaintiff has proved that the cattle are ngqutu proceeds and therefore, as stated above, she cannot succeed. Secondly, if she is to be believed, then the kraal to which she belongs has not acquired any title to the cattle which had previously been acquired by the present defendant.

We have carefully considered the provisions of Section 9 of the Chief's Court Rules. The provisions therein are directory and not peremptory, as pointed out in the case of Dhladhla *vs.* Dhladhla, 1934, N.A.C. (T & N) 36, and the delay in registration does not invalidate the judgment. In any case, only if we were able to find that the woman is the owner of the property, can the question of the invalid attachment be considered.

Counsel for appellant has concentrated on ground 4 of the notice of appeal, while not abandoning the other grounds. Ground 4 is not tenable as the woman was duly assisted and therefore she was given the right to sue. She, however, was not able to prove her case and Defendant was entitled to succeed. In the circumstances the appeal succeeds with costs and the Native Commissioner's judgment is altered to read: "For Defendant with costs."

For Appellant: Adv. J. H. Niehaus, i/b Messrs. Hellett & de Waal, Estcourt.

For Respondent: Adv. G. Caminsky, i/b Mr. J. M. K. Chadwick, of Estcourt.

Cases referred to:—

Dhladhla *v.* Dhladhla, 1934, N.A.C. (T & N) 36.

Statutes, etc., referred to:—

Rule 9, Government Notice No. 2255, dated 21st December, 1929.

CASE No. 19 OF 1951.

MBALI MASOKA (Appellant) *v.* BANGIMPI MCUNU (Respondent).

N.A.C. CASE No. 14/1951.

PIETERMARITZBURG: Tuesday, 10th April, 1951. Before Steenkamp, President, Israel and Ashton, Members of the Court (North-Eastern Division).

Practice and Procedure—Notice of Appeal—Service on other party.

Held: That the Notice of Appeal or Cross-Appeal must be served on the other party *forthwith.*

Held further: That normally, if the respondent accepts service of the notice of the hearing of appeal and raises no objection, then the maxim *omnia praesumuntur rite esse acta* would apply.

Appeal from the Court of the Native Commissioner, Weenen.

Steenkamp (President), delivering the judgment of the Court:—

The appeal in this case was noted on the 14th February, 1951. This notice of appeal was addressed to the Attorney for Respondent and to the Clerk of the Court at Weenen. There is no indication that the notice of appeal had been served on Respondent's Attorney, as prescribed in Rule 9 of the Native Appeal Court Rules published under Government Notice No. 2254 of 1928. Normally, if the respondent accepts service of the notice of the hearing of appeal and raises no objection, then the maxim *omnia praesumuntur rite esse acta* would apply, but there is filed of record an affidavit by the attorney who acted for respondent in the Court below to the effect that only after he had received a notice of hearing of the appeal from the Clerk of the Court did he, for the first time, receive any intimation that an appeal had been noted. This notice was received by him on the 7th March, 1951, i.e. more than five weeks after judgment had been given in the case.

Rule 9 (1) of the Native Appeal Court Rules reads as follows:—

> "After the noting of an appeal or cross-appeal a copy of the notice of appeal or cross-appeal shall forthwith be served upon the other party. Such copy may be served, free of charge, by the party who noted the appeal or cross-appeal in person, by delivery to the other party personally in the presence of a witness; or at the request of the party noting the appeal or cross-appeal, such copy shall be served by the Messenger of Court concerned, upon prepayment by such party, of the Messenger's fees for service."

In the case of Qina *v.* Qina, 1938, N.A.C. (C.O.) 92, it was decided that the rule referred to requires that service of the copy of the notice of appeal should be made upon the opposite party "forthwith", which is defined in the Concise Oxford Dictionary of current English as "immediately", "without delay". We do not agree that the legal meaning of the word "forthwith" is that which the Court assigned to it in that case. Bell's Legal Dictionary defines "forthwith" as not being peremptory as "immediately" and rather should it be interpreted to mean "within a reasonable time."

The case of Qina *v.* Qina was again brought before the same Court [Preference 1939, N.A.C. (C.O.) 41], when application was made for the condonation of the late noting. It was then pointed out that section 15 of the Native Administration Act had apparently not been taken into account when the objection in the previous case, which is purely of a technical nature, was raised. We agree with that exposition of the principles apparent from section 15 of the Act.

According to the affidavit already referred to—on being informed by the Clerk of the Court that respondent's attorney had not received a copy of the notice of appeal, appellant's attorney thereupon furnished a copy and had it served through the Messenger of the Court.

In the present appeal, although the notice to respondent's attorney was not served "forthwith", the fact is that he received it at the hands of the Messenger of the Court, and this Court is prepared to subscribe to the arguments advanced by appellant's Counsel that it should not be necessary to note a fresh appeal.

The attorney for respondent in his affidavit states that after judgment had been given in respondent's favour, he advised respondent to keep in touch with his office until such time as the period in which to note an appeal had expired. The Respondent did this and when no notice of appeal had been received within the prescribed period, he was advised by his attorney that he could now proceed to work. The first intimation respondent's attorney therefore received that an appeal had been noted, was on the 7th March. He even then tried to contact respondent, but has been unable to trace him.

It is realised by this Court that some relief must be granted to the appellant, and, acting within the powers conferred on it, this Court will have to consider the least expensive, yet effective, indulgence. The respondent is in possession of the notice of appeal and therefore it seems rather superfluous that a fresh appeal should be noted. It is a fundamental principle of law that where a postponement can cure any prejudice to which the other litigant might be subjected, then such postponement must be granted in preference to any more drastic action. At the same time this Court must also consider the respondent's position. His legal representative is in possession of the notice of appeal and it is only a question of affording him an opportunity to defend the appeal, and for that purpose a postponement will answer any prejudice the respondent might suffer.

It is accordingly ordered that the appeal be and is hereby postponed to the 9th July, 1951. It is further ordered that a notice of hearing be served by the Messenger of the Court on respondent at his last place of residence.

All wasted costs are to be borne by appellant.

For Appellant: Adv. Seymour i/b A. Milne and Buchan, of Weenen.

Respondent in default.

Cases referred to:—

Qina *v.* Qina, 1938, N.A.C. (C.O.) 92.
Qina *v.* Qina, 1939, N.A.C. (C.O.) 41.

Statutes, ordinances, etc:—

Rule 9 (1) published in Government Notice 2254 of 1928.

CASE No. 20 OF 1951.

HONGO MDHLALOSE (Appellant) *v.* **BUGUBU MDHLALOSE (Respondent).**

N.A.C. CASE No. 30/51.

PIETERMARITZBURG: Wednesday, 11th April, 1951. Before Steenkamp, President. Israel, Permanent Member; and Ashton, Member of the Court (North-Eastern Division).

Practice and Procedure—Absolution from the instance.

Held: That where the evidence did not justify the presiding officer in giving judgment for either party, there is no alternative but to give judgment of absolution from the instance.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

The only point in this case is whether the Native Commissioner should have given an absolution judgment instead of judgment for defendant.

The case had previously been heard when absolution judgment was granted. Plaintiff issued a fresh summons and this time the Native Commissioner found that plaintiff has again not proved his case and also that defendant's evidence is such that he is not entitled to a judgment.

According to Rule 28 of the Native Commissioner's Court Rules, the Court may do one of three things:—

(*a*) Give judgment for the plaintiff, or
(*b*) give judgment for defendant, or
(*c*) give absolution from the instance if it appears to the Court that the evidence does not justify the Court in giving judgment for either party.

It appeared to the Native Commissioner that the evidence did not justify him in giving judgment for either party and he therefore had no alternative but to give judgment of absolution from the instance.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "Absolution from the instance with costs".

For Appellant: Adv. O. A. Croft-Lever i/b. Messrs. McGillewie & Co., Pietermaritzburg.

For Defendant: Mr. C. Nathan of Messrs. Nathan & Co., Pietermaritzburg.

Statutes, Proclamations, etc., referred to:—

Rule 28, Government Notice No. 2253 of 1928.

CASE No. 21 OF 1951.

ELIJAH NXUMALO (Appellant) *v.* **MTAKATI NXUMALO (Respondent).**

N.A.C. CASE No. 10/51.

ESHOWE: Tuesday, 17th April, 1951. Before Steenkamp, President, Israel and Ofebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Extension of time in which to appeal from Chief's Court to Native Commissioner's Court.

Held: That the Native Commissioner must state that he has granted an extension of time in which to appeal, and that the record of the proceedings before him must indicate that an application for such extension has been made.

Held further: That there is no presumption that an appeal was noted within the prescribed time.

Held further: That the rules must be jealously guarded and a Court must not hear an appeal unless the record is in order and the rules have been complied with.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President), delivering the judgment of the Court:—

The Chief gave judgment on the 15th March, 1950. An appeal to the Native Commissioner was lodged on the 1st May, 1950. According to section 5 of the Chief's Court Rules, an appeal must be noted within 30 days, provided that for good cause shown, the Native Commissioner may extend the period.

In Zulu *v.* Zulu, 1935, N.A.C. (T & N) 19, the Native Commissioner in hearing the appeal, stated that he had granted an extension of time, but apart from that statement there was nothing whatsoever in the record to show that an application for extension of time had been made or granted. The question was also raised in the case of Ntombela *v.* Zungu, N.A.C. 111/50, heard at Vryheid on the 28th March, 1951, and this Court set aside the proceedings with costs and restored the Chief's judgment. In the present case the Native Commissioner does not even state that he had granted an extension, nor is there any record that application was made.

It has been argued before this Court by both Counsel that it must be presumed that the appeal was noted within the prescribed time, but we are not prepared to subscribe to such a submission. The rules must be jealously guarded and a Court must not hear an appeal unless the record is in order and the rules have been complied with.

There was no proper appeal before the Native Commissioner and in view of two previous decisions by this Court it is not proposed to draw any distinction as between those two cases and the present one, and therefore it is ordered that the proceedings in the Native Commissioner's Court be and are hereby set aside with costs. No costs of appeal.

For Appellant: W. E. White, Esq., Eshowe.

For Respondent: S. H. Brien, Esq., Eshowe.

Cases referred to:—

Zulu *v.* Zulu, 1935, N.A.C. (T & N) 19.
Ntombela *v.* Zungu, 1951, N.A.C. (NED).

CASE No. 22 OF 1951.

ZANEMPI NZUZA (Appellant) *v.* MPANGENI BIYELA & ORS. (Respondents).

N.A.C. CASE No. 31/51.

ESHOWE: 19th April, 1951. Before Steenkamp, President, Israel and Oftebro, Members of the Court (North-Eastern Division).

Native Law—Assault—Actionable under Native Law and Custom in Natal.

Held: That in Natal (which includes Zululand), assault has been and is still, regarded as founding a perfectly competent action for damages.

Appeal from the Court of the Native Commissioner, Eshowe.

Israel (Permanent Member), delivering the judgment of the Court:—

In the Native Commissioner's Court plaintiff sued the first and second defendants for damages for assault and joined third defendant as their guardian, of whose kraal they were inmates.

At the hearing, after it had been established that the case was being brought under Native Law and Custom, defendants' attorney excepted to the summons on the grounds—

> "that it discloses no cause of action in as much as assault is not actionable under Native Law and Custom."

The Native Commissioner upheld this exception and plaintiff is now appealing against this judgment.

It is undoubted that in true Native Law a person "cannot eat his own blood", that is, cannot sue for damages arising from an assault, and this principle is indeed given full recognition in Courts administering Native Law in the Transvaal and Cape Provinces. But in Natal (which includes Zululand), assault has been, and is still, regarded as founding a perfectly competent action for damages, and various decisions in the Native High Court (Sipongonana *v.* Nkuku, 1901, N.H.C. 26, is the first and therefore most notable), followed by several in this Court, have all upheld this distinction, in so far as such actions in Natal are concerned.

In his reasons for judgment the Native Commissioner quoted as his authority for upholding the exception, the case of Madumo *v.* Manne, 1932, N.A.C. (T & N) 16, but he lost sight of the fact that that was a Transvaal case and is therefore distinguished.

The exception, therefore, has no substance, and the appeal must be allowed with costs.

The judgment in the Native Commissioner's Court is set aside and the record returned for hearing on the merits. Wasted costs in the Court below payable by defendant.

For Appellant: Mr. H. H. Kent of Eshowe.

For Respondent: Mr. G. D. E. Davidson of Empangeni.

Cases referred to:—

Madumo *v.* Manne, 1932 N.A.C. (T & N) 16.
Sipongonana *v.* Nkuku, 1901, N.H.C. 26.

CASE No. 23 OF 1951.

CLIFFORD NGCOBO (Appellant) *v.* MDHLENI NGCOBO (Respondent).

N.A.C. CASE No. 6/51.

DURBAN: Monday, 23rd April, 1951. Before Israel, Acting President, Gillbanks and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Action for damages—Must have caused damage actual or implied or infringed some right.

Held: To quote Maasdorp—"that in order to make a wrong actionable it is essential that it shall have caused some damage actual or implied in law to someone."

Appeal from the Court of the Native Commissioner, Ndwedwe.

Israel (Acting President), delivering the judgment of the Court:—

The plaintiff, now appellant, sued his father, the defendant, now respondent, in the Chief's Court for no specific damages but because, as he said, his father refused to skin a beast belonging to him, which had died.

In the Chief's Court he was given judgment "for the costs". The defendant then appealed to the Native Commissioner who reversed this judgment and gave judgment "For defendant. Plaintiff to pay costs", and against this the plaintiff now appeals to this Court.

This is a nebulous matter in which no damages have been claimed or proved and in which even specific performance has not been prayed.

Maasdorp op page 2, Volume IV, 5th Edition, states that "in order to make a wrong actionable it is essential that it shall have caused some damage, actual or implied in law, to someone." The matter before us does not satisfy any of these requirements. The action complained of has apparently caused no damage, nor has it infringed any rights as far as can be made out. It is therefore not actionable and should not have been brought to the Courts at all.

The appeal is dismissed with costs and the proceedings in the Chief's Court and Native Commissioner's Court are quashed.

Appellant in person.

Respondent in person.

CASE No. 24 OF 1951.

EBENEZER KUZWAYO (Appellant) *v.* **MZWAKE KHULUSE (Respondent).**

N.A.C. CASE No. 12/51.

DURBAN: Monday, 23rd April, 1951. Before Israel, Acting President, Gillbanks and Oftebro, Members of the Court (North-Eastern Division).

Native Law—Earnings of minor.

Held: That the earnings of a minor, whether in cash or in kind, accrue during his minority to his mother's house, and he can acquire no personal private rights in that property on obtaining his majority or on marriage.

Appeal from the Court of the Native Commissioner, Ndwedwe.

Israel (Acting President), delivering the judgment of the Court:—

This is an interpleader action in which the claimant is the son of the Execution Debtor and lives in his kraal, and the respondent is the Judgment Creditor.

As a result of the judgment against the debtor a writ was issued and the Messenger of the Court attached, in the possession of the Judgment Debtor, four head of cattle, namely (1) a cow—red with white marks, (2) Jersey ox, (3) black ox, (4) red ox with white mark on legs.

The evidence established, and was not disputed, that claimant had bought all four of these animals: numbers (1) and (4) whilst he was a minor and numbers (2) and (3) after he had reached his majority.

The Native Commissioner decided that numbers (1) and (4) were not executable and numbers (2) and (3) were, and gave no order as to costs. Appeal is now noted against this decision on the following grounds:—

That the Native Commissioner erred in declaring two head of cattle executable, as his decision was against the weight of evidence and bad in law.

That the Native Commissioner erred in making no order as to costs as costs should have been granted to the appellant.

It is not stated in what respect the judgment is bad in law and therefore this particular ground of appeal will be ignored.

As there was no cross-appeal regarding the two head declared "not executable" it will be necessary for this Court to decide the ownership of the cattle numbers (2) and (3) only.

In the case of Mkwanazi *v.* Zulu, 1938 (N.A.C.) (T. & N.) 258, this Court ruled that the earnings of a minor, whether in cash or in kind, accrued during his minority to his mother's house and he can acquire no personal private rights in that property on obtaining his majority or on marriage. This, in our opinion, is a correct exposition of Native Law, but in 1939 in the case of Njeyane *v.* Sekgobela, 1939 (N.A.C.) (T. & N.) 83, it was held that a son's cattle cannot be attached for his father's debts, irrespective of whether these were acquired during the son's minority or after he had attained his majority. This ruling appears to be based on the fact that the Code permits minors to acquire property, but it seems to have lost sight of the fact that such property does not vest in the minor but accrues to his house. In 1947, however, in the case of Ngqulunga *v.* Ngqulunga, 1947 (N.A.C.) (T. & N.) 84, this Court, in no uncertain terms, re-iterated the ruling given in Mkwanazi's case *supra.*

This Court, therefore, must hold that the decision in Njeyane's case has been over-ruled in so far as it purported to place the downright ownership of cattle acquired by a minor, in that minor. Indeed, neither section 26 nor section 35 of the Code, each of which deals specifically with minors and their rights and obligations, vests a minor with any property rights. Thus the contention that the two head, numbers (2) and (3), are the property of the claimant and therefore not attachable for his father's debts, is untenable.

As for the costs, the Native Commissioner declined to award them to either party on the grounds that "as claimant was only successful in half his claim, it would be more equitable to make no order as to costs." With this we agree.

The appeal is therefore dismissed with costs.

For Appellant: R. I. Arenstein, Esquire, of Durban.

Respondent in person.

Cases referred to:—

Mkwanazi *v.* Zulu, 1938 (N.A.C.) (T. & N.) 285.

Njeyane *v.* Sekgobela, 1939 (N.A.C.) T. & N.) 83.

Ngqulunga *v.* Ngqulunga, 1947 (N.A.C.) (T. & N.) 84.

Statutes, Ordinances, etc:—

Sections 26 and 35, Proclamation No. 168 of 1932.

CASE No. 25 OF 1951.

MTUKUZI MTSHALI (Appellant) *v.* **NKAMBANE MDIMA (Respondent).**

N.A.C. CASE No. 23/1951.

DURBAN: Tuesday, 23rd April, 1951. Before Israel, Acting President, O. C. Oftebro and C. R. Gillbanks, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeal from Chief's Court—Appeal noted out of time—No mention of application for condonation.

Held: That if there is no mention of the application for condonation having been considered, the matter was not properly before the Native Commissioner—the omission cannot be remedied at this stage.

Appeal from the Court of the Native Commissioner, Ndwedwe.

Israel (Acting President), delivering the judgment of the Court:—

This is a case in which the appellant appealed to the Native Commissioner's Court against a judgment in favour of respondent, entered by a Chief. That appeal was noted out of time and an application for condonation of the late filing of appeal was made to the Native Commissioner's Court.

On the day of hearing the matter was postponed by the Assistant Native Commissioner in the absence of the Native Commissioner, but no mention appears of the application for condonation. On the postponed date the Native Commissioner proceeded with the matter forthwith, and again there is no mention of the application for condonation having been considered.

In these circumstances the matter was not properly before the Native Commissioner and the omission cannot be remedied at this stage.

The proceedings in the Native Commissioner's Court, therefore, are set aside with costs.

For Appellant: Mr. Cowley i/b Cowley & Cowley, Durban.

Respondent: In default.

CASE No. 26 OF 1951.

MZAMENI NGCOBO (Appellant) *v.* ZITONTO SIBIYA (Respondent).
N.A.C. CASE No. 34/51.

DURBAN: Tuesday, 24th April, 1951. Before Israel, Acting President, Gillbanks and Oftebro, Members of the Court (North-Eastern Division).

Defamation of Character.

Held: That the word "uyathengwa" (English equivalent "you are or can be bribed"), when applied to a man in an official position, the intention to defame is overwhelmingly implied.

Appeal from the Court of the Native Commissioner, Durban.

Israel (Acting President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, now appellant, instituted action against defendant, who is now the respondent, for £30 damages for defamation in that defendant, in the presence of others, uttered the following statement:—

"Musa ukungcleka ngesi hunzi, angani nyathengwa wena? Angikufuni eduze kwami". These words translated mean:

"Do not cast your shadow upon me, because you are paid and bribed. I do not want you near me.",

to which plaintiff attached the innuendo that plaintiff is "umtakati" and is bribed to administer his "umuti" herbs.

The Native Commissioner found that the words were not defamatory *per se* and that he was unable to accept the innuendo placed on them. He therefore entered judgment for defendant with costs. Plaintiff now appeals to this Court on the grounds that the decision is against the weight of evidence and that the Commissioner erred in holding that there was no defamation.

This Court is satisfied that the words complained of were actually used. Plaintiff and his witnesses have established that fact. The question then is whether they are defamatory. We are unable to agree that any element of witchcraft can be imported into the words, but we are concerned with the word "uyathengwa" which in English means: "You are, or can be, bribed", implying malpractices: Such malpractices would include bribery and, when applied to a man in an official position as is the plaintiff, the intention to defame is overwhelmingly implied.

The statement complained of therefore, in our opinion, is defamatory *per se*, and being so the onus is placed on the defendant to rebut the presumption of *animus injuriandi*.

McKerron in his "Law of Delict" says: "It is true that where the words complained of were in themselves and in their ordinary meaning defamatory of the plaintiff the existence of *animus injuriandi* was presumed, but it was always open to the defendant to rebut the presumption by leading evidence to show that in fact he had no intention of injuring the plaintiff."

The learned author goes on to say: "The existence of *animus injuriandi* is presumed from the mere fact that the defamatory words were published of the plaintiff and the plaintiff establishes a *prima facie* case when he shows that the defendant was responsible for their publication."

The act of publication is not seriously disputed, and the question remains, has defendant rebutted the *animus injuriandi*?

Defendant merely denies that he used the words at all, and in this, in view of the evidence which is recorded, he must be regarded as condemning himself out of his own mouth, for, had he not used the words complained of, there is no reason why the witnesses should be so unanimous in saying that he did so.

We therefore hold that the defamation has been established and the question of damages now arises.

The plaintiff claimed £30 in the Native Commissioner's Court. This, we consider, is excessive. In a Native's own forum, one beast, or even a goat, would have been sufficient damages in a case of this nature.

In the circumstances, therefore, we consider that £5 is reasonable.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"For plaintiff for £5, with costs."

For Appellant: Adv. Cowley, i/b. Messrs. Cowley & Cowley, Durban.

Respondent in person.

CASE No. 27 OF 1951.

JAMES MUTALI (Appellant) *v.* **JOHN BILLY (Respondent).**

N.A.C. CASE No. 36/1951.

PRETORIA: Monday, 4th June, 1951. Before Steenkamp, President. Balk, Permanent Member and Ahrens, Member of the Court. (North-Eastern Division).

Delict—Damages for assault—Pain and suffering.

Held: That where as a result of an assault, the plaintiff has established that he has suffered pain, he is entitled to damages on that score.

Appeal from the Court of the Native Commissioner, Messina.

Balk (Permanent Member), delivering the judgment of the Court:—

1. In this case the Assistant Native Commissioner found, and properly so on the evidence, that the defendant had assaulted the plaintiff and awarded the latter the sum of £6. 4s. for loss of earnings, with costs, but refused to make any award on the score of pain, suffering, shock and disablement in respect of which £50 was claimed.

2. The appeal is against the latter portion of the judgment.

3. It is clear from the evidence that as a direct result of the assault plaintiff suffered a fracture of the lower end of his right leg and an abrasion as well as bruising and swelling over that fracture; it is equally clear from the medical evidence that this injury caused certain pain and suffering for a limited period.

4. There is no evidence to support the portion of the claim in question in so far as disablement is concerned so that the question of any damages on that score falls away.

5. The Assistant Native Commissioner found that as a result of the assault plaintiff suffered pain and this finding is supported by the evidence as stated above.

6. Consequently the Assistant Native Commissioner should have made an award on that score.

7. As this Court is able to make the necessary assessment from the evidence no purpose would be served by referring the proceedings back to the Assistant Native Commissioner for that purpose.

8. On the basis laid down in the judgment in Radebe *v.* Hough 1949 (1), S.A.L.R. 380, this Court considers that £15 would be a fair award for the plaintiff's pain and suffering in this case.

9. The appeal is allowed with costs and the award of damages in the Court below is increased from £6. 4s. to £21. 4s. with costs.

Steenkamp (President):—

I agree that the Assistant Native Commissioner should have assessed damages for pain and suffering.

The factors that led to the assault which took place during a drunken fracas, are such that in assessing damages we must bear in mind it is a fundamental principle of law that provocation mitigates damages and I am not so certain that £15 as assessed by the majority of the members is not too high. I am not however in a position to state that £15 is so grossly excessive as to entitle me to dissent.

For Appellant: Mr. A. Jones of Lunnon & Tindall, Pretoria.

Respondent in default.

Cases referred to:—

Radebe *v.* Hough, 1949 (1), S.A.L.R. 380.

CASE No. 28 OF 1951.

THAPEDI MOKGOHLOA (Appellant) *v.* **JAN SENOMADI (Respondent).**

N.A.C. CASE No. 41/51.

PRETORIA: Tuesday, 5th June, 1951. Before Steenkamp, President, Balk, Permanent Member and V. P. Ahrens, Member of the Court (North-Eastern Division).

Practice and Procedure—Tort-feasor—Must be cited as a party to the proceedings—Immaterial whether a minor or not.

Held: That it is fatal not to cite the tort-feasor as a party to the proceedings.

Held further: That it is immaterial whether the tort-feasor is a minor or not as according to the principles of our Common Law parents are not liable in damages for the torts of their children.

Held further: That Native Law and Custom makes provision for the joint liability of the son and the father but not of the father alone.

Appeal from the Court of the Native Commissioner, Pietersburg.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, now appellant, sued the defendant for damages which he suffered as the result of defendant's son having seduced plaintiff's daughter.

The tort-feasor, namely the defendant's son, was not cited as a party. This was fatal as according to the decisions in the case of Pali *v.* Diamond, 1940, N.A.C. (CO) 39, and in the case of Dhlamini *v.* Gatebe, 1944, N.A.C. (CO) 69, the tort-feasor must be cited as a party.

It is immaterial whether the tort-feasor is a minor or not as according to the principles of our common law as mentioned on page 297 of Maasdorp's "Law of Persons", Volume I, 7th Edition, parents are not liable in damages for the torts of their children. Native Law and Custom, however, does make provision for the joint liability of the son and the father, but not the father alone. The proceedings having been irregular in the Native Commissioner's Court, this Court has no other alternative but to declare them such. It is accordingly ordered that the appeal be dismissed with costs but the Native Commissioner's judgment is altered to read "Summons dismissed with costs". It follows that all costs incurred in the Native Commissioner's Court must be borne by plaintiff.

For Appellant: Mr. le Roux of v. d. Merwe, Haasbroek & Boezaart, of Pretoria.

Respondent in default.

Cases referred to:—

Pali *v.* Diamond, 1940, N.A.C. (C.O.) 39.

Dhlamini *v.* Gatebe, 1944, N.A.C. (C.O.) 69.